

FILED
RECEIVED
U.S. DISTRICT COURT
DISTRICT OF NEVADA

2012 AUG 15 A 10:13

Joseph A. Guerra
8938 W. Katie Ave.
Las Vegas, NV 89147
Tel: (702)-243-3427
Plaintiff in Pro Per

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

Joseph A. Guerra,
Plaintiff,
v.

Case No.: 2:10-cv-00029-KJD-RJJ

OBJECTION TO MAGISTRATE
JUDGE'S "ORDER" DOC #105

JUST MORTGAGE, INC.; CHASE HOME
FINANCE LLC; MERS and DOES 1 -
10,
Defendants.

Comes now Joseph A. Guerra, Plaintiff, to file in this court of
record, his OBJECTION TO MAGISTRATE JUDGE'S "ORDER" DOC #105
(Exhibit A) pursuant to the following facts and reasons:

I. STATUTORY AUTHORITY AND FEDERAL RULES OF CIVIL PROCEDURE

A. The Federal Rules of Civil Procedure (FRCP) are rules
governing civil procedure in United States District (federal)
courts, that is, court procedures for civil suits. The FRCP are
promulgated by the United States Supreme Court pursuant to the
Rules Enabling Act, and then approved by the United States
Congress.

B. The Federal Rules of Civil Procedure were completely
rewritten, effective December 1, 2007, under the leadership of

1 a committee headed by law professor Bryan A. Garner, for the
2 avowed purpose of making them easier to understand. The style
3 amendments were not intended to make substantive changes in the
4 rules. If this court is using any other rules of civil
5 procedure, please so advise.
6

7 C. At issue in this case, at least, are two statutory
8 provisions dealing with parameters of a magistrate's authority
9 to resolve certain issues, Fed.R.Civ.P. 73 and 28 U.S. Sec. 636.
10

11 D. Rule 73. Magistrate Judges: Trial by Consent; Appeal

12 (a) Trial by Consent

13 When authorized under 28 U.S.C. § 636(c), a magistrate judge
14 may, if all parties consent, conduct a civil action or
15 proceeding, including a jury or nonjury trial. A record must be
16 made in accordance with 28 U.S.C. § 636(c)(5).
17

18 (b) Consent Procedure.

19 (1) In General.

20 When a magistrate judge has been designated to conduct civil
21 actions or proceedings, the clerk must give the parties written
22 notice of their opportunity to consent under 28 U.S.C. § 636(c).
23 To signify their consent, the parties must jointly or separately
24 file a statement consenting to the referral. A district judge or
25 magistrate judge may be informed of a party's response to the
26 clerk's notice only if all parties have consented to the
27 referral.
28

1 (2) Reminding the Parties Regarding Consenting.

2 A district judge, magistrate judge, or other court official may
3 remind the parties of the magistrate judge's availability, but
4 must also advise them that they are free to withhold consent
5 without adverse substantive consequences.
6

7
8 **II. FACTUAL ALLEGATIONS**

9 **1.** Plaintiff was not properly served through Certified Mail or
10 Subpoena, **nor did he have consent** to attend the magistrate
11 judge's Order for Settlement Conference on June 29, 2012.
12

13 Plaintiff received a "NOTICE TO SHOW CAUSE" from Magistrate
14 Judge Johnston stating that a hearing was scheduled for August
15 6, 2012 to an Order to SHOW CAUSE before Magistrate Judge Robert
16 J. Johnston where as Plaintiff expected District Court Trial
17 Judge Dawson to preside over this hearing because of its
18 importance of the possibility of sanctions being granted.
19
20

21 **2.** The Plaintiff submitted an **Objection** to Magistrate Judge's
22 Order Scheduling a Settlement Conference on June 1, 2012 to and
23 including a pleading to District Court Judge Dawson to conduct a
24 **de novo** review of my Objection because Plaintiff was in fear of
25 not being treated fairly and having Magistrate Judge Johnston
26 being partial during the Settlement Conference.
27
28

3. During the Hearing , Magistrate Judge Johnston informed the

1 Plaintiff that he relied on Fed.R.Civ.P. 16(f) as a guidance
2 under Sanctions to order the Plaintiff pay the Defendants
3 Counsel the full amounts requested for fees and costs contained
4 in their affidavits 98, 99 and 100. Fees and Costs shall be paid
5 by 9/7/2012.
6

7
8 4. Rule 16(f) Sanctions are "designed to punish lawyers and
9 parties for conduct which unreasonably delays or otherwise
10 interferes with the expeditious management of trial
11 preparation." See Goforth v. Owens, 766 F.2d 1533, 1535(11th Cir.
12 1985). The Sanctions granted by Magistrate Judge Johnston was
13 too harsh for the Plaintiff and feel that the Magistrate Judge
14 had abused his discretionary powers (an abuse of discretion
15 occurs without evidentiary support) over and above what is
16 reasonable under Fed.R.Civ.P. 16(f) since the Plaintiff did not
17 willfully disobey the court's order to attend the Settlement
18 Conference, but rather merely waiting for Judge Dawson's answer
19 to his Objection Filing on 06/01/2012. (Belk of Spartanburg S.C.
20 Inc. v. Thompson, 337 S.C. 109, 126-27, 522 S.E. 2d 357, 366
21 (Ct.App.1999) ruling is based on an error of law, when grounded
22 in factual conclusions, is without evidentiary support.) After
23 all, there isn't any Trial Date that was set-up for this case as
24 of today. Magistrate Judge also referred to Rule 37 as another
25 guide line during the Hearing on 8/6/2012 which may render a
26
27
28

1 Sanction against the disobedient party. See Fed.R.Civ.P.
2 37(b)(2)(A)(vi). However, in order to impose the Sanction, the
3 district court must make a finding of willful or bad faith
4 failure to comply. See Malautea v. Suzuki Motor Co., Ltd., 987
5 F.2d 1536, 1542(11th Cir. 1993).
6

7
8 **5. Notwithstanding any provision of law (or rule) to the**
9 **contrary, subsection 636(c)(1) clearly mandates the consent of**
10 **all the parties:** "Upon the consent of the parties..." (phrase is
11 repeated twice). **I did not** give my consent or signed anything
12 giving my consent.
13

14 **Notwithstanding any provision of law (or rule) to the**
15 **contrary, subsection 636(c)(2) clearly mandates the consent of**
16 **all the parties:** "[P]arties...are free to withhold consent without
17 adverse substantive consequences." "Rules of court...shall include
18 procedures to protect the voluntariness of the parties'
19 consent." [emphasis added]. See Miranda v. Arizona, 384 U.S.
20 436, 491 (1966) (where rights secured by the Constitution are
21 involved, there can be no rule making or legislation which would
22 abrogate them).
23
24

25 **Let it be known, that the Plaintiff NEVER CONSENTED to a**
26 **United States Magistrate Judge. Plaintiff hereby specifically**
27 **denies that a proper Consent Form was ever signed, filed or**
28 **served upon Plaintiff.**

1 6. On 7/02/2012, DOC #93 (Exhibit B) - Minutes of Proceedings,
2 the name of Chase/MERS attorney's name is not on this list,
3 and do not care if Chase/MERS's attorney claims that she was
4 there, I am not responsible for her costs or fees! Furthermore,
5 Plaintiff never received a "Notice Of Appearance" pursuant to
6 NRS 622A.310 to be retained by Just Mortgage, Inc. from attorney
7 M. Stephen Cho from the law firm of Cho, Sheasby Chung &
8 Ignacio, LLP because Mr. Cho is a stranger to me. How come this
9 Court doesn't impose infractions on these incidents? Therefore,
10 it is not reasonable for the Plaintiff to pay for a strangers
11 fees. Anyway, all the works and/or materials that were prepared
12 by the attorneys can be used for the future Settlement
13 Conference or Trial.
14
15
16
17

18 7. Therefore, Plaintiff hereby files this **Objection** to the
19 Order of the Magistrate Judge to impose Sanctions against him to
20 pay the high attorney fees and costs since Magistrate Judge
21 Johnston did not have Plaintiff's consent or was served properly
22 to attend the Settlement Conference, and therefore, Magistrate
23 Judge does not have the authority under 28 U.S.C. §636(c)(1) to
24 issue **ORDERS**.
25

26 8. Plaintiff poses this one overriding question to this Court
27 at this time, and that is, by what legal authority does the
28 Magistrate Judge act in issuing the ORDER in question? In other

1 words, I am asking this Court to identify the Rule and Code of
2 written law which supports the Magistrate Judge's ruling!

3
4
5 **III. CASE PRECEDENCE**

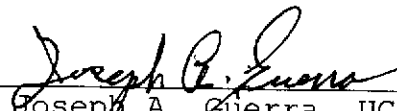
6
7 **A. WHEN A PARTY FILES TIMELY WRITTEN OBJECTIONS TO A MAGISTRATE**
8 **JUDGE'S REPORT, THE DISTRICT COURT MUST "MAKE A DE NOVO**
9 **DETERMINATION OF THOSE PORTIONS OF THE REPORT OR SPECIFIED**
10 **PROPOSED FINDINGS OR RECOMMENDATIONS TO WHICH OBJECTION IS MADE.**
11 **"28 U.S.C. § 636 (b) (1) (C); see also Summers v. Utah, 927 F.2d**
12 **1165, 1167 (10th Cir. 1991) ("De Novo review is statutorily and**
13 **constitutionally required. . . .")**

14
15 **B. Any party is free to withhold consent to magistrate**
16 **jurisdiction without adverse consequences. 28 U.S.C. § 636(c) (2);**
17 **Rule 73(b), Fed.R.Civ.P.; Anderson v. Woodcreek Venture Ltd.,**
18 **351 F.3d 911, 913-14 (9th Cir. 2003) (pointing out that consent is**
19 **the "touchstone of magistrate judge jurisdiction" under 28**
20 **U.S.C. § 636(c).**

21
22 Finally, 28 U.S.C. § 636(c) (4) and Federal Rule of Civil
23 Procedure 73(b) (3), authorize the District Judge, for good cause
24 shown, or on the judge's own Motion, or under any extraordinary
25 circumstances shown by any party to **vacate a reference of a**
26 **civil matter to a magistrate judge.**

1 **WHEREFORE**, the Plaintiff prays that the District Court
2 review the "ORDER" of the Magistrate Judge and Plaintiff's
3 filings in this case **de novo**, and find all of the judicial
4 notices and objections with merit sufficient to overturn the
5 Magistrate's "ORDER".

6
7
8 Respectfully submitted this 15th day of August 2012

9
10 
11 Joseph A. Guerra, UCC1-308
12 Plaintiff in Pro Per
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

CERTIFICATE OF SERVICE

I hereby certify that on August 15, 2012, I mailed a copy of this **OBJECTION TO MAGISTRATE JUDGE'S "ORDER" DOC #105** to the following parties by First Class Mail:

James E. Murphy, Esq.
6720 Via Austi Parkway, Suite 430
Las Vegas, Nevada 89119

Katie M. Weber, Esq.
Smith Larson & Wixom
Hill Center Business Park
1935 Village Center Cr.
Las Vegas, NV 89134

M. Stephen Cho, Esq.
CHO SHEASBY CHUNG & IGNACIO, LLP
1035 Foothill Blvd., Suite 460
Rancho Cucamonga, CA 91730



Beata Ha

EXHIBIT A

Doc. 105 dated 08/06/2012

08/06/2012	105	MINUTES OF PROCEEDINGS - Hearing re order to show cause ⁹⁴ held on 8/6/2012 before Magistrate Judge Robert J. Johnston. Crtrm Administrator: <i>J. Ries</i> ; Def Counsel: <i>Katie M. Weber and James E. Murphy</i> ; Court Reporter/FTR #: <i>10:03 - 10:25</i> ; Time of Hearing: <i>10:00 a.m.</i> ; Courtroom: <i>3D</i> ; The plaintiff, Joseph Guerra is present. The court canvasses and hears representations and arguments of the parties. ORDERED The plaintiff shall pay defense counsel the full amounts requested for fees and costs contained in the affidavits ⁹⁸ , ⁹⁹ and 100. Fees and costs shall be paid by 9/7/12. (no image attached) (Copies have been distributed pursuant to the NEF - JAR) (Entered: 08/07/2012)
------------	-----	--

EXHIBIT B

Doc.93 dated 07/02/2012

07/02/2012	93	<p>MINUTES OF PROCEEDINGS - Settlement Conference held on 6/29/2012 before Magistrate Judge Robert J. Johnston. Crtrm Administrator: <i>MXS</i>; Pla Counsel: <i>None</i>; Def Counsel: <i>James E. Murphy and M. Stephen cho</i>; Court Reporter/FTR #: <i>None</i>; Time of Hearing: <i>8:30 AM</i>; Courtroom: <i>ADRsuite</i>. Pro Se Plaintiff, Joseph A. Guerra was not present for the settlement conference. Present for Defendant Just Mortgage Inc. was Bryan Choi, President. Present for Defendant Chase Home Finance was Sharon Green, HL Research Officer. No settlement was reached as Pro Se Plaintiff, Joseph A. Guerra was not present. The Court will issue a separate Show Cause order regarding the failure to appear. This matter is returned to the normal litigation track. (no image attached) (Copies have been distributed pursuant to the NEF - MXS) (Entered: 07/02/2012)</p>
------------	----	---